

Jul 13, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JAY HYMAS, d/b/a DOSMEN  
FARMS,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF  
INTERIOR; RYAN ZINKE, Secretary  
of the United States Department of the  
Interior; JAMES W. KURTH, Acting  
Director of the United States Fish and  
Wildlife Service; and DOES I-X,

Defendants.

No. 4:16-CV-05091-SMJ

**ORDER DENYING PLAINTIFF'S  
MOTION FOR AN ANSWER AND  
DEFENDANTS' MOTION TO  
DISMISS FOR LACK OF  
PROSECUTION**

On March 20, 2017, the Court dismissed each of Plaintiff Jay Hymas's claims except for his claim in Count III of the Amended Complaint that the Fish and Wildlife Service's awards of cooperative farming agreements in 2012, 2013, 2014, and 2015 were arbitrary, capricious, an abuse of discretion, and contrary to law. ECF No. 96 at 17–19. With respect to this remaining claim, the Court entered a scheduling order for anticipated summary judgment motions. ECF No. 101. The order directed the government to file the Administrative Record no later than May 19, 2017, and directed Hymas to file a summary judgment motion no later than June

1 19, 2017. *Id.* The government complied with this order, filing the Administrative  
2 Record on May 12, 2017. ECF No. 112.

3 Hymas did not file a motion for summary judgment on or before June 19,  
4 2017. Instead, on July 10, 2017, he filed a Motion for an Answer, Jury Trial,  
5 Discovery, Scheduling Conference and Oral Argument. ECF No. 114. Because this  
6 case involves a challenge to administrative decisions documented by an extensive  
7 administrative record, it is likely this case may be resolved without further  
8 discovery. The Court therefore concludes it is not necessary to enter a scheduling  
9 order for discovery and trial until the Court considers whether to enter summary  
10 judgment based upon the administrative record. Accordingly, Hymas's motion is  
11 denied.

12 The government moves to dismiss Hymas's remaining claim for failure to  
13 prosecute because Hymas failed to file a merits brief on his remaining claim in  
14 compliance with the Court's scheduling order. ECF No. 115. While Rule 41(b)  
15 permits a court to dismiss for failure to prosecute or comply with a court order,  
16 dismissal on this procedural basis would be unfair here where Plaintiff is proceeding  
17 pro se and another court has found that Hymas's claim has merit, *see Hymas v.*  
18 *United States*, 117 Fed. Cl. 466, 503–06 (2017). Accordingly, Hymas's remaining  
19 claim should be resolved on the merits.

1 Hymas's filings to date suggest that giving him another opportunity to file  
2 the first summary judgment motion would be unproductive. The Court therefore  
3 vacates the existing scheduling order, ECF No. 101, and sets new dates for briefing  
4 summary judgment as specified at the end of this order.

5 The government has not answered or otherwise responded to the remaining  
6 claims in Hymas's complaint. Pursuant to Federal Rule of Civil Procedure  
7 12(a)(4)(A) the government's responsive pleading was due within 14 days after the  
8 Court's order granting partial dismissal. *See Sun v. Rickenbacker Collections*, No.  
9 5:10-cv-1055-EJD, 2012 WL 2838782, at \*2 (N.D. Cal. July 10, 2012) ("The  
10 majority of courts have held that Rule 12(a)(4)(A) also applies in circumstances  
11 where, as here, the defendant files a motion to dismiss that is only partially  
12 dispositive.") The Court is unaware of any statute or rule excusing the government  
13 from its obligation to file a responsive pleading in this case. However, because the  
14 Court's summary judgment scheduling order could have created confusion about  
15 the government's obligation to file an answer, the Court now grants the government  
16 leave to file an appropriate responsive pleading within 14 days of this order.

17 Accordingly, **IT IS HEREBY ORDERED:**

18 **1.** Plaintiff's Motion for an Answer, Jury Trial, Discovery, Scheduling  
19 Conference, and Oral Argument, **ECF No. 114**, is **DENIED**.

2. Defendants' Motion to Dismiss for Lack of Prosecution, **ECF No. 115**, is **DENIED**.

3. Defendants shall file a responsive pleading to the remaining claims in Plaintiff's Amended complaint **within 14 days of this order**.

4. Defendant shall serve and file a motion for summary judgment **no later than August 11, 2017**.


5. Plaintiff shall serve and file any response to Defendant's motion or a cross-motion for summary judgment **no later than September 11, 2017**.

6. Defendants shall serve and file any reply in support of its motion for summary judgment **no later than September 25, 2017**.

7. The parties' motions shall be noted for hearing on **October 9, 2017 at 6:30 p.m.** without oral argument.

**IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and provide copies to all counsel and pro se plaintiff.

**DATED** this 13th day of July 2017.

  
\_\_\_\_\_  
SALVADOR MENDEZ, JR.  
United States District Judge